In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-557

LARRY RICH and DENNIS
ALLEN ROTH,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT
OF APPEAL, FLORIDA

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QUESTIONS PRESENTED

(1) WHETHER ONCE A SHIP IS REDUCED TO THE DOMINION AND CONTROL OF THE THE AUTHORITIES, IS IMMOBILIZED AND NO EXIGENT CIRCUMSTANCES REMAIN, MAY WARRANTLESS SEARCHES OF AND SEIZURES FROM THE SHIP'S REPOSITORIES NONETHELESS BE CONDUCTED WITHOUT

OFFENDING THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

(2) WHETHER SEARCHES BY OFFICERS MADE PURSUANT TO AN UNCONSTITUTIONAL AND INVALID ADMINISTRATIVE REGULATION AUTHORIZING THEM TO CONDUCT WARRANTLESS SEARCHES WITHOUT PROBABLE CAUSE, ARTICULABLE SUSPICION, OR ANY OTHER STANDARD OF INDIVIDUALIZED OBJECTIVE FACTS CAN, CONSISTENT WITH THE POLICIES OF THE FOURTH AMENDMENT, BE VALIDATED AFTER THE FACT BY A HINDSIGNT JUDICIAL DETERMINATION OF PROBABLE CAUSE SUBSTITUTED FOR THE OFFICERS' OWN EXERCISE OF PROPER DISCRETION?

(3) WHETHER THE ADMINISTRATIVE LAW DOCTRINE THAT "THE GROUNDS UPON WHICH AN ADMINISTRATIVE ORDER MUST BE JUDGED ARE THOSE UPON WHICH THE RECORD DIS-

CLOSES THAT ITS ACTION WAS BASED," *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1947), SHOULD BE INCORPORATED INTO FOURTH AMENDMENT LAW AS A RULE BY WHICH THE ACTIONS OF OFFICIALS SHOULD BE REVIEWED AT HEARINGS UPON A MOTION TO SUPPRESS EVIDENCE?

(4) WHETHER THE INITIAL BOARDING AND SEARCH OF THE SHIP IN THIS CASE WAS SUPPORTED BY PROBABLE CAUSE?

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OPINIONS BELOW

The Second District Court of Appeal's opinion in *Roth v. State* is reported at 378 So.2d 794 (Fla. 2nd DCA 1979) and the per curiam affirmance in *Rich v. State* is reported at 380 So.2d 591 (Fla. 2nd DCA 1979).

JURISDICTION

To the extent a substantial question may be presented jurisdiction is properly invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens or the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes

Section 370.021, Administration, rules, regulations, etc.

(1) Rules and regulations.--The department of natural resources shall make, adopt, promulgate, amend and repeal all rules and regulations necessary or convenient for the carrying out of the duties, obligations, powers and responsibilities conferred on said department or any of its divisions. The director of each division shall submit to the department suggested rules and regulations for that division. Any person violating or otherwise failing to comply with any of

the rules and regulations adopted as aforsaid shall be guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083, unless otherwise provided by law.

* * *

(5) POWERS OF OFFICERS.* -The department may designate such employees of the several divisions, as it may deem necessary in its discretion, as law enforcement officers, who shall meet the provisions of s.943.13 and subsection 943.12 (1) and have the powers and duties conferred in this subsection, except that such employees shall comply with the provisions of chapter 943. Such officers, together with the executive director and the director of the Division of Marine Resources, are constituted law enforcement officers of this state with full power to investigate and arrest for any violation of the laws of this state and the rules and regulations of the department under their jurisdiction and for violations of chapter 253 and the rules and regulations promulgated thereunder.

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*This section was amended by Chapter 79-65, Laws of Florida, to omit from second sentence "Department of Marine Resource" and to add in its stead "Department of Law Enforcement".

The general laws applicable to arrests by peace officers of this state shall also be applicable to such law enforcement officers. Such law enforcement officers may enter upon any land or waters of the state for performance of their lawful duties and may take with them any necessary equipment, and such entry shall not constitute a trespass. It shall be lawful for any boat, motor vehicle, or aircraft owned or chartered by the department or its agents or employees to land on and depart from any of the beaches or waters of the state. Such law enforcement officers shall have the authority, without warrant, to board, inspect, and search any boat, fishing appliance, storage or processing plant, fishhouse, spongehouse, oysterhouse, or any other warehouse, building, or vehicle engaged in transporting or storing any fish or fishery products. Such authority to search and inspect without a search warrant is limited to those cases in which such law enforcement officers have reason to believe that fish or any saltwater products are taken or kept for sale, barter, transportation, or other purposes in violation of laws or rules promulgated under this law. Any such law enforcement officer may at any time seize or take possession of any saltwater products or contraband which have been unlawfully caught,

taken, or processed or which are lawfully possessed or transported in violation of any of the laws of this state or any rule or regulation of the department. Such law enforcement officers may arrest any person in the act of violating any of the provisions of this law, rules or regulations of the department, the provisions of chapter 253 and the rules and regulations promulgated thereunder, or any of the laws of this state. It is hereby declared unlawful for any person to resist such arrest or in any manner interfere, either by abetting or assisting such resistance or otherwise interfering, with any such law enforcement officer while engaged in the performance of the duties imposed upon him by law or regulation of the department.

Florida Seafood Quality Control Code

16B-28.23 Inspection of boats engaged in transporting seafood in primary or secondary production.

The Department or its agents shall have authority, without warrant, to board, inspect and search any boat or vehicle engaged in transporting any primary or secondary seafood, as often as may be deemed necessary for enforcement of the provisions of this subsection and for protection of the

public health.

STATEMENT OF THE CASE

While on routine patrol, marine patrol officers McCrone and Harn encountered a large trawler type shrimping vessel which appeared to be at anchor. The vessel was rigged for shrimping and had dry nets hanging over the side; it appeared to be loaded and was sitting low in the water. Also the vessel, the Dudley, had a commercial registration decal on its bow, indicating that the boat made more than fifty percent of its income from commercial fishing. Officer McCrone told petitioner Rich that he would like to board the Dudley to check the nets, the hatch and the hold and received no response. The Officer also asked Rich if there

were shrimp on board and received a negative reply. Prior to boarding the Dudley, McCrone detected no sound coming from that vessel. No bilge pumps or refrigeration pumps were running and the officer testified that shrimp is a hazardous type of seafood, very susceptible to spoilage from improper refrigeration.

NcCrone boarded the vessel to check the hold but prior to looking there Rich told him that he had something illegal down there, to-wit: marijuana. At that point, McCrone became concerned for the officers' safety. Rich and three other passengers on the vessel were frisked for weapons, arrested and advised of their rights. McCrone radioed his office to inform them he had seized a boat and was going to the

Boca Grande dock. McCrone and Harn looked in the hold and observed burlap sacks that emitted a strong odor of marijuana. Rich was directed to pilot the vessel to the Boca Grande docks. McCrone also radioed the Coast Guard and relayed his seizure of the marijuana-laden vessel.

Rich offered McCrone $20,000 in cash and delivery of a millon dollars more to forget the whole thing. Rich opened a drawer in the wheelhouse, picked up a plastic baggie of marijuana and mentioned that here was another baggie. McCrone told him to put it back in the drawer and close it and Rich did so.

At the dock, Marine Patrol Investigator John Patterson boarded the Dudley to secure the money if there

was any. A total of eighteen thousand dollars was found in the pilot house. Subsequently, the Dudley was taken to the Fort Myers City Yacht Basin where the marijuana was off-loaded.

Both petitioners moved to suppress the seized marijuana, and in separate hearings before different judges, the motions to suppress were denied. In separate appeals to the Second District Court of Appeal, Rich's conviction was affirmed without opinion* and Roth's conviction was overturned and the trial court was ordered to apply a probable cause standard to the search and seizure. *Roth v. State*, 378 So.2d 794 (Fla. 2nd DCA 1979).

**Rich v. State*, 380 So.2d 591 (Fla. 2nd DCA 1979).

The Supreme Court of Florida denied each petitioner's request for certiorari review.

REASONS WHY THE WRIT SHOULD BE DENIED

The petition for writ of certiorari should be denied because no substantial federal or constitutional question is presented. As to petitioner Roth, the lower court (in a decision reported at 378 So.2d 794) merely held that the trial court had misapplied the law by failing to employ the standard of probable cause and it remanded the case to the trial court for another hearing on the suppression issue. It would appear then, that the Roth case is not final since it still remains for the trial court to apply the proper legal standard. In addition, a very real ques-

tion remains as to whether Roth can assert any personal fourth amendment interest since he merely was present on the Dudley at the time of the patrol officers' boarding the vessel and he offered no evidence on his personal fourth amendment rights alleged to have been invaded. See *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Salvucci*, ___ U.S. ___, 65 L.Ed.2d 619 (1980).

The lower court entered no written opinion in affirming the judgment and sentence of petitioner Rich so it cannot be determined whether the result was predicated upon consent to search or probable cause to search or some other reason.

In their first issue, petitioners contend that an important question is presented by the warrantless seizure of marijuana in the hold of a ship, analogizing the situation to the

search of personal luggage located in an automobile in *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *United States v. Chadwick*, 433 U.S. 1 (1977). Justice Powell stated in *Arkansas v. Sanders*, *supra*:

> ". . .This Court has not had occasion previously to rule on the constitutionality of a warrantless search of luggage taken from an automobile lawfully stopped. Rather, the decisions to date have involved searches of some integral part of the automobile. See, e.g., South Dakota v. Opperman, supra, at 366, 49 L Ed 2d 1000, 96 S Ct 3092 (glove compartment); Texas v. White, 423 US, at 68, 46 L Ed 2d 209, 96 S Ct 304 (passenger compartment); Cady v. Dombrowski, supra, at 437, 37 L Ed 2d 706, 93 S Ct 2523 (trunk); Chambers v. Maroney, 399 US, at 44, 26 L Ed 2d 419, 90 S Ct 1975 (concealed compartment under the dashboard); Carroll v. United States, 267 US, at 136, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (behind the upholstering of the seats)."
>
> (442 U.S. at 763).

The instant case does not involve the warrantless search of person's luggage but the seizure of the contents of the hold of a boat, an area analogous to the trunk of an automobile. Accordingly, the instant case is controlled by *Chambers v. Maroney*, 399 U.S. 42 (1975).

Petitioners contend in their second issue that the lower court resuscitated by a hindsight judicial determination of probable cause an unconstitutional search and seizure. The contrary is true. Had the appellate court truly substituted its judgment on factual matters it would simply have affirmed Roth's conviction and held the trial court's misapplication of the proper legal standard to be harmless error. Instead, the lower court took the proper course of action—it ordered the

trial court to apply the proper standard. Since the Florida appellate court did not, in Roth's case, seek to make an "independent judicial assessment of debatable facts" to sustain the lower court's action, the argument presented, while interesting, is not apposite. In the case of petitioner Rich, the trial judge had not applied an incorrect legal standard and the appellate court did not second guess the trial court. Respondent submits that it is an amazing proposition to assert that an appellate court may not permissibly order the court being reviewed to apply a correct legal standard.

In their third issue, petitioners request that certain principles of administrative law should apply to judicial review of searches and sei-

zures. Suffice it to say that no court in the instant case had made different factual findings than any adminstrative fact finder. What petitioners really seek is a subjective rather than objective test of probable cause, a position consistent rejected by this Court. As stated in *Scott v. United States*, 436 U.S. 128 at 138:

> "We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."

See also *United States v. Robinson*, 414 U.S. 218 (1973); *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

In the instant case, the marine patrol offiers had probable cause and

lawful authority to act under *F.S.* 370.021(5); it matters not that the officers may have had in mind an administrative regulation subsequently declared invalid.

Finally, petitioners Rich and Roth contend in issue number four that the search and seizure on the boat was unsupported by probable cause. The facts in the instant case included:

(1) A shrimping vessel with a decal indicating involvement in commercial fishing with shrimp nets visible on deck was observed by marine patrol officers;

(2) The boat was riding low in the water and appeared to be loaded;

(3) There was no sound of

refrigeration equipment operating nor bilge discharge to indicate the presence of melting ice;

(4) The officers well knew that improper refrigeration easily leads to shrimp spoilage.

(5) Thus, the officers had probable cause to board the vessel and to inspect the hold for seafood quality control violations.

(6) Prior to seaching the hold petitioner Rich volunteered the information that the hold contained marijuana, giving them probable cause to search and seize the marijuana in the hold.

Two courts (the state trial and appellate courts) have concluded that the marine patrol officers had probable cause to act as they did in petitioner Rich's case.* Such a finding is not clearly erroneous and the "two-court" rule should preclude re-evaluation of this factual finding. See *Comstock v. Institutional Investors*, 335 U.S. 211 (1948); *Boulden v. Holman*, 394 U.S. 478 (1969).

CONCLUSION

The instant petition fails to present any substantial federal or constitutional question. Accordingly, the instant petition for writ of certiorari

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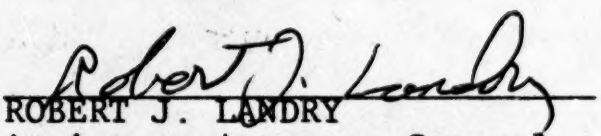
*As stated earlier in the case of Roth, the lower court has ordered a remand to the trial court for reconsideration using the proper legal standard.

should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, Counsel for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of December, 1980, I served three copies of the Petition for Writ of Certiorari on Joseph Beeler, Esquire, Counsel for Petitioner, Suite 900, 28 West Flagler

Street, Miami, Florida 33130, by a duly addressed envelope with postage prepaid.

Robert J. Landry

ROBERT J. LANDRY
Assistant Attorney General